

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RENÉ TIBUCIO VALENZUELA,
Petitioner.

No. 2 CA-CR 2014-0389-PR
Filed March 5, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20050781

The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

René Tibucio Valenzuela, Eloy
In Propria Persona

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which
Presiding Judge Miller and Judge Espinosa concurred.

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ECKERSTROM, Chief Judge:

¶1 Petitioner René Valenzuela seeks review of the trial court's denial of his successive petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Although we grant review, we deny relief.

¶2 After a jury trial in 2006, Valenzuela was convicted of two counts of child molestation, four counts of sexual conduct with a minor under fifteen, and one count each of kidnapping, child abuse, continuous sexual abuse of a child, furnishing obscene or harmful items to a minor, and sexual abuse of a minor under fifteen. The trial court sentenced him to slightly mitigated prison terms, some consecutive and some concurrent, totaling 101 years.¹ We affirmed his convictions and sentences on appeal. *State v. Valenzuela*, No. 2 CA-CR 2006-0238 (memorandum decision filed Aug. 21, 2008). This appears to be Valenzuela's third Rule 32 proceeding. See *State v. Valenzuela*, No. 2 CA-CR 2013-0105-PR (memorandum decision filed Jul. 2, 2013); *State v. Valenzuela*, No. 2 CA-CR 2010-0258-PR (memorandum decision filed Nov. 29, 2010).

¶3 In his most recent petition for post-conviction relief, Valenzuela claimed the trial court had erred in permitting a doctor to testify at trial that the victim's behavior during a physical examination suggested she had previous sexual experience. He maintained the doctor's testimony violated A.R.S. § 13-1421, which limits the admissibility of evidence of "specific instances of the victim's prior sexual conduct," and he alleged he was further

¹The trial court vacated Valenzuela's conviction and sentence for one count of child molestation after the state conceded error in his second Rule 32 proceeding. See *State v. Valenzuela*, No. 2 CA-CR 2013-0105-PR, ¶¶ 4-5 (memorandum decision filed Jul. 2, 2013). Valenzuela's aggregate term of imprisonment was not affected by that ruling, because a concurrent sentence had been imposed for the conviction that was vacated.

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prejudiced by the state's reliance on this testimony during its closing argument.

¶4 Essentially, Valenzuela argued he was denied a fair trial because of these alleged errors. *See* Ariz. R. Crim. P. 32.1(a) (ground for post-conviction relief when "conviction . . . was in violation of the Constitution of the United States or of the State of Arizona"). But a petitioner may not ordinarily raise such claims in a successive or untimely Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction relief "based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding"); Ariz. R. Crim. P. 32.4(a) (Rule 32 proceeding "not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)").

¶5 Seeking to avoid the preclusive effect of these rules, Valenzuela asserted his claims were based on "newly discovered material facts" that "probably would have changed the verdict," pursuant to Rule 32.1(e). *See* Ariz. R. Crim. P. 32.2(b) (preclusion, under Rule 32.2(a), "shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h)"). Valenzuela argued, "A.R.S. 13-1421(A) itself is the newly discovered material fact" that "existed in his case prior to [his] coming to the knowledge" of that statute. The trial court found Valenzuela's claims precluded, denied relief, and subsequently denied Valenzuela's motion for reconsideration. This petition for review followed.

¶6 On review, Valenzuela argues the merits of his claim and suggests the trial court abused its discretion in finding it precluded. He apparently continues to contend the issue "constitute[d] a newly discovered material fact," under Rule 32.1(e), and therefore fell within an exception from preclusion listed in Rule 32.2(b). He also seems to argue the court should have reviewed the merits of his claim "under the standard for cause articulated" in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), because he alleges his attorneys were ineffective in failing to assert the claim at trial, on appeal, or in previous Rule 32 proceedings. Finally, he characterizes his claim as one of "manifest constitutional error" that

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this court should address, “despite [his] failure to notice or raise the issue in a previous post-trial proceeding.”

¶7 We review a trial court’s summary denial of post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here. In its thorough rulings, the court fully explained why Valenzuela’s claim was not based on newly discovered material facts, as required for the exception from preclusion provided by Rules 32.1(e) and 32.2(b). We need not repeat that correct analysis here; instead, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶8 With respect to Valenzuela’s argument that the Supreme Court’s decision in *Martinez* provides a basis to excuse his raising his claim in an untimely, successive proceeding, this court does not address issues raised for the first time in a petition for review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980). And, in any event, we have already concluded the Supreme Court “limited its decision” in *Martinez* “to the application of procedural default in federal habeas review”; *Martinez* therefore does not affect our consideration of state claims brought under Rule 32. *State v. Escareno-Meraz*, 232 Ariz. 586, ¶¶ 5-6, 307 P.3d 1013, 1014 (App. 2013), *citing Martinez*, ___ U.S. at ___, 132 S. Ct. at 1315, 1319-20.

¶9 Similarly, we have explained the preclusive effect of Rule 32.2(a)(3) applies even when a petitioner claims fundamental error occurred and deprived him of a fair trial. *See State v. Swoopes*, 216 Ariz. 390, ¶¶ 40-43, 166 P.3d 945, 958 (App. 2007). Thus, notwithstanding Valenzuela’s assertion of “manifest constitutional error,” the trial court correctly denied post-conviction relief on the ground of preclusion.

¶10 Accordingly, review is granted, but relief is denied.